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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,
JEREMY DAVIS, CHRISTOPHER
CASTILLO, and MONIQUE TRUJILLO
individually and on behalf of all similarly
situated,

Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' ADMINISTRATIVE
MOTION REGARDING COURT'S
MAY 20, 2022 ORDER**

CIVIL L.R. 7-11

1 Pursuant to Civil Local Rule 7-11, Plaintiffs respectfully seek permission from the Court
 2 for limited further briefing regarding Google’s response to the Court’s sanctions order (Dkts. 588,
 3 593-3) (the “Sanctions Order”),¹ which demonstrates additional misconduct by Google that
 4 continues to prejudice Plaintiffs.

5 This motion stems from a declaration that Google served on June 14, 2022, where Google
 6 employee Martin Sramek identified [REDACTED] additional logs that contain Incognito detection bits. A true
 7 and correct copy of Mr. Sramek’s June 14 declaration is attached to the concurrently filed Mao
 8 Declaration as **Exhibit A** (the “June 14 Sramek Decl.”). Google served this declaration pursuant
 9 to the Court’s Sanctions Order, which required Google to “provide Plaintiffs with a representation
 10 in writing no later than **May 31, 2022** that other than the logs identified thus far as containing
 11 Incognito-detection bits, no other such logs exist.” Dkt. 593-3 at 6 (emphasis in original).

12 Google did not meet that deadline. Instead, on May 31, 2022, Google served a declaration
 13 (also from Mr. Sramek) stating that Google’s investigation started on May 23 was “ongoing,” and
 14 that it would take another two weeks. A true and correct copy of Mr. Sramek’s May 31, 2022
 15 Declaration is attached to the concurrently filed Mao Declaration as **Exhibit B** (the “May 31
 16 Sramek Decl.”); *id.* ¶ 5. Prior to sending this declaration, Google did not ask the Court or Plaintiffs
 17 for any extension. Google also did not attempt to justify why it needed an extension to investigate
 18 the existence of logs that Plaintiffs have been seeking to identify for many months, and that the
 19 Court specially inquired about during the April 21, 2022 Sanctions hearing (where Google could
 20 not provide a straightforward response). Instead, Google granted itself a two-week extension, and
 21 then *provided the June 14 declaration after Plaintiffs served their final expert reports.*

22 Google should have disclosed these logs containing the Incognito detection bits many
 23 months ago, including in response to this Court’s initial Order to Show Cause Why Google Should
 24 Not be Sanctioned for Discovery Misconduct (“Order to Show Cause”). As a result of Google’s
 25 failure to disclose these Incognito detection bits and the logs in which they exist sooner,

26
 27 ¹ On May 31, 2022, the parties filed a joint submission regarding sealing portions of the Sanctions Order, which had
 28 a public version of the Sanctions Order with proposed redactions. Dkt. 593. Accordingly, Plaintiffs will refer to the
 publicly-available information revealed in Dkt. 593-3.

1 compounded by Google's self-granted extension, Plaintiffs were unable to obtain discovery
 2 regarding these additional logs or even note their existence in Plaintiffs' final expert reports, which
 3 were served on June 7, 2022. Dkt. 581.

4 According to Mr. Sramek's June 14 Declaration, the [REDACTED] *additional* logs (above and beyond
 5 the [REDACTED] logs that Plaintiffs and the Court knew about as of the April 21, 2022 Sanctions hearing)
 6 that contain Incognito-detection bits also:

- 7 1. [REDACTED]
 8 (June 14 Sramek Decl. ¶ 11);
- 9 2. Support Google's [REDACTED] (*id.* ¶ 6);
- 10 3. Are [REDACTED] (*id.* ¶ 7); and
- 11 4. [REDACTED]
 12 [REDACTED] (*id.* ¶ 9).

13 Google also disclosed an additional [REDACTED] log containing these Incognito-detection bits,
 14 but Google did not provide any substantive description of the data contained in that log or the
 15 identifiers used with that log. *Id.* ¶ 12.

16 Google also still has not complied with the Court's requirement that Google "provide
 17 Plaintiffs with a representation in writing . . . that . . . no other logs exist." Dkt. 593-3 at 6.

18 Google's belated disclosure of these additional data sources (and continuing refusal to
 19 represent that no other logs exist) has prejudiced Plaintiffs, and Plaintiffs respectfully request an
 20 opportunity to submit very short additional briefing for the Court on these issues. Plaintiffs wish
 21 to seek additional sanctions pursuant to Federal Rule of Civil Procedure 37, including preclusion
 22 and issue sanctions, jury instructions, and monetary sanctions.

23 Plaintiffs request that the Court set a briefing schedule on an expedited track:

<u>Pleading</u>	<u>Page Limit</u>	<u>Due Date</u>
Plaintiffs' Motion and Memorandum	8	July 1, 2022
Google's Opposition	8	July 8, 2022
Plaintiffs' Reply	5	July 15, 2022

Google has informed Plaintiffs that it is not opposed to additional briefing on these issues, but Google stated that any additional briefing in July would cause Google “to oppose the briefing schedule and/or seek to push the class cert briefing and expert discovery deadlines back.” Mao Decl. ¶ 3. Plaintiffs have worked extremely hard to meet the class certification and expert discovery deadlines, and Google’s additional discovery misconduct should not provide any basis for Google to now seek to modify any of those deadlines. Google should not be permitted to complain about timing when the timeframe is entirely attributable to Google’s misconduct. Had Google disclosed these additional [REDACTED] logs when Plaintiffs first uncovered the Incognito detection bits, the parties would have already briefed their import and there would no need for additional briefing. Google’s delay and obstruction has already prejudiced Plaintiffs, and it is improper for Google use that same delay and obstruction to delay any imposition of additional sanctions or obtain more time for Google’s opposition to Plaintiffs’ class certification motion.

Dated: June 23, 2022

Respectfully submitted,

By: /s/Mark Mao

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